Supreme Court, U.S.
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No. 90-1538

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

DOUGLAS E. ONDRUS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

PETITION FOR A WRIT OF CERTIORARI

RONALD A. GREGORY
Major, Office of The Judge Advocate General
United States Air Force
HQ USAF/JAJD
Bldg 5683
Bolling AFB, DC 20332-6128
(202) 767-1562
Counsel of Record

JEFFREY R. OWENS
Lieutenant Colonel, Office of The Judge Advocate General
United States Air Force
Counsel for Petitioner

APRIL 1991

QUESTION PRESENTED

Whether the petitioner was denied effective assistance of counsel by counsel's failure to conduct a reasonable pretrial investigation or make an informed decision not to do so.*

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* This question and this petition are presented to this Honorable Court pursuant to Article 67a(1), Uniform Code of Military Justice, 10 U.S.C. § 867a(1), and *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Douglas E. Ondrus, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on January 7, 1991.

OPINIONS BELOW

The order of the United States Court of Military Appeals granting review and affirming the lower court's decision is reported at —— M.J. —— (C.M.A. January 7, 1991). (Appendix A). An unpublished decision of the United States Air Force Court of Military Review was rendered July 17, 1990 following remand by the Court of Military Appeals. (Appendix B).

JURISDICTION

The jurisdiction of this Court is invoked under 10 U.S.C. § 867a and 28 U.S.C. § 1259(3). The judgment of the Court of Military Appeals was entered on January 7, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.

Article 27(b) of the Uniform Code of Military Justice, 10 U.S.C. § 827(b) provides:

> Trial counsel or defense counsel detailed for a general court-martial—
>
> (1) must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and
>
> (2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

Article 38(b)(1) of the Uniform Code of Military Justice, 10 U.S.C. § 838(b)(1) provides:

> The accused has the right to be represented in his defense before a general or special court-martial or at an investigation under section 832 of this title (article 32) as provided in this subsection.

STATEMENT OF THE CASE

In accordance with his pleas the petitioner was tried and convicted by general court-martial of two specifications of wrongfully using marijuana, one specification of

distributing methamphetamine, one specification of using methamphetamine, one specification of using cocaine, and five specifications of failing to go to his appointed place of duty at the time prescribed, in violation of Articles 112a and 86, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 886(1), respectively. He was found not guilty of one specification of failing to obey a lawful order in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892. He was sentenced to a bad conduct discharge, confinement for twenty-eight (28) months, and forfeiture of all pay and allowances. The convening authority approved the sentence as adjudged on May 4, 1989. The United States Air Force Court of Military Review initially affirmed the findings and sentence on July 25, 1989, addressing the issue of sentence appropriateness. *United States v. Ondrus*, ACM 27670 (AFCMR July 25, 1989)

Upon petition to the United States Court of Military Appeals the petitioner submitted an affidavit alleging ineffective assistance of counsel. The Court of Military Appeals set aside the decision of the lower court and remanded the record of trial to that court for further review of this previously unaddressed issue. *United States v. Ondrus*, 29 M.J. 353 (C.M.A. 1989) (order setting aside decision and remanding record for further review).

The Air Force Court of Military Review again affirmed the findings and sentence after resolving the petitioner's claims of ineffective assistance of counsel against him and finding the approved sentence appropriate. *United States v. Ondrus*, ACM 27670 (f rev) (A.F.C.M.R. Jul. 17, 1990). (Appendix B). The Court of Military Appeals granted the petition for review and affirmed the lower court's decision without discussion. *United States v. Ondrus*, —— M.J. ——, No. 63294/AF (C.M.A. Jan. 7, 1990) (order granting review and affirming decision below). (Appendix A).

REASONS FOR GRANTING THE WRIT

The petitioner's trial defense counsel failed to reasonably investigate the evidence against the petitioner and thereby caused the petitioner to enter pleas of guilty on evidence untested by the adversarial process. In the post-trial affidavit considered by the courts below, the petitioner states that he sought counsel early in the investigation but counsel refused to meet with him until the pretrial hearing pursuant to Article 32, Uniform Code of Military Justice, 10 U.S.C. § 832. He did not meet with his attorney again until shortly before the court-martial. The attorney negotiated a pretrial plea agreement that reduced the maximum confinement from twenty-two (22) years and five (5) months to thirty (30) months.

The Sixth Amendment and Article 27, Uniform Code of Military Justice, 10 U.S.C. § 827, guarantee a military accused the right to effective assistance of counsel. *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987). The right applies at both the pretrial hearing stage and the trial. Article 38(b)(1), Uniform Code of Military Justice, 10 U.S.C. § 838(b)(1). Counsel has a duty to make a reasonable investigation of the facts or make a reasonable decision not to investigate a particular area. *Scott*, 24 M.J. at 188 (citing *Strickland v. Washington*, 466 U.S. 668, 691 (1984)). To sustain a claim of ineffective assistance an accused must allege specific errors of counsel which violate prevailing professional norms. *Id.* (citing *United States v. Cronic*, 466 U.S. 648 (1984)).

Counsel's failure to meet with the petitioner until the date of the pretrial hearing violated the duty to conduct a reasonable investigation or make an informed decision not to do so. Independent investigation is necessary to the adversarial process. *Id.* (citing *Chronic*, 466 U.S. at 690). Without such investigation a criminal accused must make ultimate trial decisions on evidence

untested by the adversarial process. In the case *sub judice* counsel failed to investigate the most critical source of information, the petitioner. This failure fell below prevailing professional norms and deprived the petitioner of effective assistance of counsel.

CONCLUSION

The adversary system demands effective assistance of counsel in the pretrial stage. Counsel's failure to communicate with the client prior to the pretrial hearing negated any chance for meaningful pretrial investigation and forced the petitioner to make critical trial decisions on evidence developed exclusively by the prosecution. Effective assistance of counsel requires more. The petition for a writ of certiorari should be granted.

Respectfully submitted,

RONALD A. GREGORY
Major, Office of The Judge Advocate General
United States Air Force
HQ USAF/JAJD
Bldg 5683
Bolling AFB, DC 20332-6128
(202) 767-1562
Counsel of Record

JEFFREY R. OWENS
Lieutenant Colonel, Office of The Judge Advocate General
United States Air Force
Counsel for Petitioner

APRIL 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 63294/AF
CMR Dkt. No. 27670

UNITED STATES,

Appellee

v.

DOUGLAS E. ONDRUS (374-94-3930),

Appellant

ORDER

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Military Review, on remand, we conclude that the action taken by the Court of Military Review following our earlier consideration of this case was adequate as a matter of law. Accordingly, it is, by the Court, this 7th day of January 1991

ORDERED:

That said petition is hereby granted; and

That the decision of the United States Air Force Court of Military Review or remand is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (GREGORY)
Appellate Government Counsel (HOLLIS)

APPENDIX B

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

UNITED STATES

v.

Airman Basic DOUGLAS E. ONDRUS, FR 374-94-3930
UNITED STATES AIR FORCE

ACM 27670 (f rev)

17 Jul. 1990

Sentence adjudged 16 February 1989 by GCM convened at Norton Air Force Base, California. Military Judge: Linda D. Carter (sitting alone).

Approved sentence: Bad conduct discharge, confinement for twenty-eight (28) months and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Captain Ronald A. Gregory.

Appellate Counsel for the United States: Colonel Joe R. Lamport; Colonel Robert E. Giovagnoni; Major Paul H. Blackwell, Jr.; Major Terry M. Petrie and Captain Morris D. Davis.

Before

BLOMMERS, KASTL, MURDOCK and MILLS
Appellate Military Judges

DECISION UPON FURTHER REVIEW

PER CURIAM:

On 7 November 1989, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the Court of Military Appeals remanded Ondrus' record of trial to this Court for further review.

We have considered the appellant's submissions in detail. Many of them lie outside our purview. For example, Ondrus complains that prior to trial his security clearance was removed and he was assigned degrading and menial jobs. He faults his chain of command because he says no one visited him during the first four months of imprisonment. He also asserts that he found a grant of immunity distasteful because it required him to speak against his fellows. While these matters reflect a young airman's understandable unhappiness at his predicament, they do not rise to the level of appellate issues in this case.

Other complaints are legitimately before us. For example, Ondrus generally suggests that: (a) his counsel failed to devote sufficient pretrial preparation to his case; and (b) counsel failed to raise motions at trial relative to Ondrus' statements, urinalysis, or pretrial confinement.

As we have noted before, convicted individuals often blame their lawyers for their predicament. *United States v. Washington*, 29 M.J. 536 (A.F.C.M.R. 1989); *pet. denied*, —— M.J. —— (C.M.A. 1990). This being so, the law presumes that counsel are effective and acting in their clients' best interests. It follows that the burden of establishing otherwise lies with the person claiming he or she was ineffectively defended. To rebut the presumption of effectiveness, the complainant must identify specific conduct which was unreasonable under accepted professional standards. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L Ed. 2d 674 (1984).

Little in the appellant's two personal sworn letters filed under *Grostefon* lends strength to his claims. To fill in the rest of the picture, trial defense counsel has provided a written affidavit. We find it effectively rebuts assertions of inadequate trial preparation or representation. Counsel relates that he became familiar with the case when he discussed related courts-martial with other defense counsel early in his preparation. His affidavit tells of numerous conversations and strategy sessions with the appellant, both in person and on the telephone.

Assessing the strength of the prosecution case, we believe the appellant is pursuing a legal mirage in claiming his attorney did not represent him with fidelity. We view counsel's strategy as realistic and practical, given the evidence piled up against his client. We see no possibility of success on the issues the appellant now is second-guessing. Counsel's sessions with his client covered a number of issues, according to trial defense counsel, and led to a defense-proposed pretrial agreement. In our judgment, that agreement appears clearly in the appellant's best interests.

In *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990), the Court of Military Appeals noted the broad experience brought to the bench by appellate military judges. We have drawn upon such background in evaluating this appellant and his record. We have assessed the evidence which was admitted to prove Ondrus' use of marijuana, cocaine, and methamphetamine, his wrongful distribution of methamphetamine, and his various failures to go. We find counsel's performance competent and adequate.

Counsel wisely elected to pursue a policy of "damage limitation." The pretrial agreement "cap" was a bad conduct discharge and 30 months confinement. The ultimate sentence of the court-martial was a bad conduct discharge, 28 months confinement, and total forfeitures.

We believe the "cap" proposed by the defense was pragmatic, given the strong prosecution case and the appellant's past record. That record included three Article 15 actions and a letter of reprimand.

After reviewing the entire record, we conclude that the appellant's recent arguments are without merit. Similarly, we find the sentence in all respects befitting this appellant, his crimes, and his record.

The findings of guilty and the sentence are correct in law and fact and, on the basis of the entire record, are again

AFFIRMED.

[SEAL]

OFFICIAL

/s/ Carole V. Petti
CAROLE V. PETTI
Clerk of Court
Court of Military Review

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